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In The
Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

WILLIAM H. SORRELL, *et al.*,

Cross-Petitioners,

v.

NEIL RANDALL, *et al.*,

Cross-Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICI CURIAE* FORMER SENATORS BILL BRADLEY AND ALAN SIMPSON IN SUPPORT OF RESPONDENTS, CROSS-PETITIONERS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici former Senators Bill Bradley and Alan Simpson urge the Court to affirm the ruling of the United States Court of Appeals for the Second Circuit in favor of Respondents. This case addresses a constitutional question of great magnitude concerning this Court's First Amendment jurisprudence in the context of campaign finance reform.[1] The issue presented herein is whether the State of Vermont's campaign expenditure limits are justified by a compelling government interest.

Bill Bradley is a former United States Senator, and a Democrat from New Jersey. He was first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997. In addition, Senator Bradley ran for the Democratic Party nomination for President of the United States in the 2000 election cycle.

Alan Simpson is a former United States Senator, and a Republican from Wyoming. He was also first elected to the United States Senate in 1978, and served three full terms, from 1979 to 1997.

Having served the nation in the United States Senate, *amici* swore an oath to "support and defend the Constitution of the United States" and to "well and faithfully discharge the[ir] duties."[2] In addition to their service in

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

[2] http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

the Senate, *amici* have raised millions of dollars for their campaigns, for their respective parties, and for other candidates. *Amici* are proud of their service in the legislative branch; however, as former members of a coordinate branch, they feel compelled to advise the Court of their utmost concern for the problem presented. With a sense of continuing obligation to serve to the nation, *amici* file this brief in support of Respondents.

SUMMARY OF THE ARGUMENT

This case raises the question whether the immense time commitment of fundraising detracts excessively from the effective performance of elected officials. Without expenditure limits, campaign costs have escalated and fundraising has become an inordinately time-consuming job for candidates and office holders. Due to the excessive demands of fundraising, it is difficult for elected officials to fulfill their duties. As a result, the quality of representation has declined, and the integrity of elected office has been undermined. Thus, protecting the time of elected officials from the burdens of constant fundraising presents a compelling government interest, an interest which was not before the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

For these reasons, the Court should affirm the constitutionality of the State of Vermont's campaign expenditure limits. In the alternative, *amici* urge the Court to hold that protecting the time of candidates and elected officials from the onerous demands of fundraising is a compelling government interest that justifies campaign finance reform measures, and to remand to the lower court for a

determination of whether the Vermont statute is narrowly tailored to achieve this compelling government interest.

Because fundraising increasingly dominates the time of candidates, the integrity of the American system of republican government is deteriorating, as time is taken from the many and focused on asking for money from the few. The instant case provides the Court with an opportunity to consider issues that are central to the integrity of our system of representative democracy, as States and localities across the nation seek to address the impact of fundraising on campaigns and on officials' performance in elected office.

I. THE SPIRALING COSTS OF CAMPAIGNS TAKE ELECTED OFFICIALS AWAY FROM THEIR SWORN DUTIES.

A. In The Absence Of Spending Limits, Campaign Costs In Federal, State And Local Elections Have Escalated.

In the 30 years since the Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976), the costs of running a successful campaign for local, state and national office have rapidly escalated. In 1978, *Amicus* Senator Bradley spent $1,688,499 in his campaign for a United States Senate seat in New Jersey. CENTER FOR RESPONSIVE POLITICS, BILL BRADLEY; bradbil.pdf, *available at* http://www.opensecrets.org. In 1990, a mere 12 years later, *Amicus* Senator Bradley spent nearly $12.5 million in his reelection bid, raising approximately forty thousand dollars per week, every week for six years. Likewise, in the 1990 senatorial race in Wyoming, *Amicus* Simpson spent $1,443,298 to win re-election, 3.3 times the amount spent in 1978. CENTER FOR RESPONSIVE

POLITICS, ALAN SIMPSON; simpsala.pdf, *available at* http://www.opensecrets.org.

Overall Congressional candidate fundraising increased 425 percent between 1978 and 2000, compared to 170 percent inflation during the same period. U.S. PUBLIC INTEREST RESEARCH GROUP, LOOK WHO'S NOT COMING TO WASHINGTON 7 (2003). From 1986 to 2000, the average cost of a successful campaign for the United States House of Representatives rose from $359,577 to $848,296. *Id.* Adjusted for inflation, this amounts to a 151 percent increase. Similarly, the average victorious Senate campaign in 1986 cost $3,067,559 compared to $7,389,176 in 2000 – a 154 percent increase, adjusted for inflation. *Id.*[3]

In the realm of presidential politics, spending has escalated at an even more alarming rate. In his bid for the 2000 Democratic Presidential Nomination, Senator Bradley, although no longer a member of the Senate, raised $8,607,781 in campaign contributions in his most successful fundraising quarter. FEDERAL ELECTION COMMISSION, "Large Fundraising Quarters in Pre-Election Years For

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[3] The following breakdown is particular noteworthy. In 1992, the average Senator had to raise nearly $13,000 each week for the entire six-year term in order to amass the amount that a winning Senate race would cost. Herbert Alexander, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 54 (1992). By 2001, Senator Barbara Boxer estimated that for a successful Senate campaign in California, a candidate would need to raise $10,000 *per day*. 145 Cong. Rec. S12575, S12608 (daily ed. Oct. 14, 1999) (statement of Sen. Boxer). In fact, she raised money at almost twice that rate. For her 2004 re-election, Sen. Boxer raised a total of $16.7 million. Of that, in the 2003-04 cycle she raised $13.8 million. Divided evenly over two years and 365 days per year, this amount equals $18,904 per day, every day, weekends and holidays included. http://www.opensecrets.org/politicians/summary.asp?CID=N00006692&cycle=2004.

Presidential Primary Campaigns," *available at* http://www.fec.gov (measured from October 1, 1999 through December 31, 1999). Sitting Vice President Al Gore, the eventual Democratic Party nominee for President, had his largest fundraising quarter in the first quarter of 1999, during which time he raised $8,881,976. *Id.* (measured from January 1, 1999 through March 31, 1999). Seeking the Republican Party's nomination in 2000, then-Governor George W. Bush dwarfed all previous fundraising quarters in history when, in the second quarter of 1999, he raised $29,484,602 in 91 days, while still serving as the Governor of Texas. *Id.*

Yet the 2000 election cycle pales in comparison to the 2004 presidential election, which shattered all previous fundraising records. Both major party nominees opted out of the public financing system for their respective party's primary campaigns and raised a combined total of $496.6 million in contributions from individuals. FED. ELECTION COMM'N, REPORT OF RECEIPTS AND DISBURSEMENTS: BUSH-CHENEY '04 INC. (Sept. 20, 2004), *available at* http://www.fec.gov; REPORT OF RECEIPTS AND DISBURSEMENTS: JOHN KERRY FOR PRESIDENT INC. (Sept. 20, 2004), *available at* http://www.fec.gov. To achieve these record sums, the two candidates combined had to raise at least one million dollars per day for well over a year.

B. As A Result, Elected Officials Spend An Excessive And Ever-Increasing Proportion Of Their Time Raising Funds For The Purposes Of Re-Election And Election To Higher Office.

Spiraling campaign costs cause elected officials to spend an excessive and ever-increasing proportion of their

time raising funds for the purposes of re-election and election to higher office.[4] Senators and Members of Congress spend many hours – every day and every week raising money, "dialing for dollars,"[5] and attending fundraisers for themselves and for others.[6] As Senator Dennis DeConcini said, "The worst thing about it is that members have to spend so much time in the pursuit of campaign finances that I think their ability to do really their best as legislators is jeopardized. . . . When I was running, I was

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[4] *See, e.g.*, 147 Cong. Rec. S2603 (daily ed. Mar. 21, 2001) (statement of Sen. Durbin) ("The whole process has been tainted . . . by the fact that so many candidates, myself included, spend so many waking hours trying to raise money to launch an effective campaign."); 133 Cong. Rec. S7782 (daily ed. Sept. 21, 1997) (statement of Sen. Reid) (stating that when he ran for the Senate while he was a member of the House of Representatives, he spent the "vast majority" of his time raising money); Martin Schram, SPEAKING FREELY 38-43 (1st ed. 1995) (setting forth interviews with current and former Republican and Democratic Senators and Representatives in which the elected officials agreed that escalating campaign costs forced them to spend too much time raising money); Dan Clawson, et al., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 203-04 (1992); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 183-84 (1988).

[5] *See* John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, WALL ST. J., Mar. 2, 1994, at A1 (quoting Sen. Diane Feinstein: "My people want me . . . to be on the phone all the time.").

[6] *See* Schram, SPEAKING FREELY 38 ("The time that you spend raising money, and the number of fund-raising events I was obliged to attend or at least stop by – gosh, you'd have five or six a night. It just wears you out doing that," (Statement of House Minority Leader Robert Michel); "[Fundraisers] three evenings per week, plus 10 to 12 hours in your own races," (Statement of Rep. Dave Durenberger); Larry Makinson, SPEAKING FREELY 36-37 ("When I was here in Washington I would go over to the [National Republican Congressional Committee] or the Senatorial Committee offices to make telephone calls for an hour, two hours every day. When I was home in Florida . . . that's the bulk of what I did. It's a very time-consuming process." (Statement of Rep. Bill McCollum).

spending about two hours a day on the phone raising money. Minimum. Six days a week." Martin Schram, SPEAKING FREELY 38.

Moreover, in order to meet the inordinate demands of a successful fundraising campaign, elected officials must begin campaigning for their next race the day they take office. This frenetic fundraising pace continues throughout their terms. As one Senator put it, "[a]s soon as a Senator is elected here, that Senator better start raising money for the next election 6 years down the pike." 134 Cong. Rec. S1053 (daily ed. Feb. 22, 1988) (statement of Sen. Harkin). Senator Robert Byrd, former Majority Leader, similarly observed: "To raise the money, Senators start hosting fundraisers years before they next will be in an election. They all too often become fundraisers first, and legislators second." 138 Cong. Rec. 115 (daily ed. Jan. 6, 1987) (statement of Sen. Byrd).[7] As one Republican Congressman said: "[Fundraising] devours one's time – you spend two or three years before your re-election fundraising. The other years, you're helping others." Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988) (quoting unnamed Republican Congressman).

Indeed, fundraising not only takes time, but it also literally takes officials away from their work. Elected officials travel frequently in order to raise money, not only within their own states, but also to states with high

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[7] *See also* Jim Barnett, *Fund Raising Is Race Before the Race for re-Election*, THE OREGONIAN, Aug. 9, 1999, at A01 (describing the intensive fundraising efforts in a Congressional race more than a year prior to election day).

concentrations of wealthy donors.[8] Candidates and elected officials cast a wide net – beyond their constituents and voters, and outside their home region – in order to raise the money needed to run a successful campaign. For example, in South Dakota in 2004, 92% of the money raised by incumbent Senator Tom Daschle came from outside of the state, as did 78% of that raised by his opponent, Jon Thune.[9] A general breakdown of 2004 fundraising data shows a chase to several hot spots around the country with high levels of campaign contributions, with the New York City metropolitan area leading with nearly $150 million, and Washington DC not far behind at $135.4 million.[10] Other stops on the campaign money tour include Los Angeles and San Francisco on the west coast, Chicago in the Midwest, and Boston and Philadelphia back on the east coast.[11] As a result, candidates must spend much of their time flying back and forth

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[8] For example, in 1986, then-Representative Thomas A. Daschle of South Dakota flew to California more than twenty times, visiting Los Angeles almost as much as he did Sioux Falls, in order to raise money for media buys in his Senate race. *See* Carol Matlack et al., *Money and Politics: A Special Report*, 22 NAT'L J. 1448, 1448 (1990); Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1998) (noting that in 1992, 28% of all individual contributions above $200 collected by candidates for federal office came from donors who live outside their states); Schram, SPEAKING FREELY 42 ("The money demands are so great, we have to go out of state . . . That's the killer") (Statement of Rep. Wyche Fowler).

[9] Statistics are published at http://www.opensecrets.org/races/instate.asp?ID=SDS1&cycle=2004&special=N.

[10] *Id.* For the top 10 most expensive Senate races from the 2004 cycle, reflecting the 20 major party candidates, the average candidate received 39.1% of her funds from out-of-state-contributors. This data was compiled from information published at www.opensecrets.org.

[11] http://www.opensecrets.org/overview/topmetro.asp?cycle=2004.

across the country – from New York to Hollywood – raising money.[12] As Sen. Wyche Fowler commented, "It takes two to three years of constant travel – you cannot, under today's system, raise [enough] money in your own state. And therefore, the time expands exponentially, because you're crisscrossing the country."[13] While this speaks of conduct at the federal congressional level, these concerns are just as prevalent at the local level. Candidates across all offices, state and federal, and across all parties, are spending considerable time raising money.[14] In Vermont specifically, the record below amply demonstrates that candidates and elected officials constantly faced the need to leave the State in order to find sufficient campaign

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[12] As one House member put it, "people would be genuinely unhappy about how much time members have to spend on fundraising. . . . And in many cases, because there is such competition for the dollars, you can't do it over the phone. You've got to get on a plane and fly to New York or Chicago or Miami or Dallas or Los Angeles. Hollywood, Wall Street." SPEAKING FREELY (1995) at http://www.opensecrets.org/pubs/speaking/speaking03.html (statement of Rep. Dennis Eckart).

[13] *Id.* (statement of Sen. Wyche Fowler). Senator Dennis DeConcini of Arizona reflected on a fundraising event as follows: " . . . And I'm in New York. Beautiful apartment facing the park. I'd never been there before. Didn't know the people who owned the apartment, who'd just raised me 46,000 bucks." SPEAKING FREELY (1995), available at http://www.opensecrets.org/pubs/speaking/speaking02.html (Statement of Sen. DeConcini). This reflects a transactional, commerce-like approach where money replaces ideas as the sole object, and candidates and elected officials blindly follow the money.

[14] For example, one study found that throughout the nation, 55 percent of candidates for state-wide office devoted more than one-quarter of their time to fundraising activities. Paul S. Herrnson and Ronald A. Faucheux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), at http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

cash.[15] Thus, fundraising not only takes time, it also takes the candidates and officeholders away from their voters and constituents.

The demographics of the donor class[16] further illustrate the way politicians and elected officials spend their time. The Center for Responsive Politics reports, "Less than one-tenth of 1% of the U.S. population gave 83 percent of all itemized campaign contributions for the 2002 elections."[17] Donors who contribute the maximum $2,000 allowed under federal law represent approximately one-tenth of 1% of the nation's adult population.[18] Under the current system, an efficient candidate focuses on raising hundreds of thousands of dollars from those who can give the most. This time is spent not with ordinary voters and constituents, but rather with the wealthy few who can help the candidate most quickly reach her

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[15] Republican State Senator William Doyle observed, "Fundraising in recent years has concentrated on out-of-state fundraising events. The reason for this is that it's much easier to raise out-of-state-money, either in Washington, New York or California." Floor Speech of Senator William Doyle (R), Ex. Vol. I, E-0092. Democratic State Senator Cheryl Rivers testified that Vermont legislators are expected to attend out-of-state fundraising events sponsored by parties and PACs, where donors gain access to the legislators. (Trial testimony of Senator Cheryl Rivers, Tr. VII-58-61). In terms of numbers, 73 percent of campaign contributions to Gov. Howard Dean's 1994 campaign were from out-of-state donors, primarily in the health care industry. Tr. IX-198 (trial testimony of Anthony Pollina).

[16] This terminology is effectively described and developed in Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PENN. L. REV. 73 (2004).

[17] http://www.opensecrets.org/pressreleases/DonorDemographics02.asp.

[18] http://www.opensecrets.org/overview/DonorDemographics.asp?cycle=2002. Contributions of $200 or more come from about one-half of one percent (0.52%) of the nation's population. *Id.*

fundraising goals. Out of necessity, time – that precious commodity – is lavished on the few.

Further, on a practical, everyday level, fundraising takes elected officials away from their place of work in the halls of government. For example, Members of Congress are not permitted to make fundraising calls from their Congressional offices, 18 U.S.C. § 607(a), and must rent separate office space for those purposes. As one Representative stated, "I rented an office on Capitol Hill, and between votes [in the House] during the time I was running for the Senate, I just camped out in that office most of the time and made phone calls." Schram, SPEAKING FREELY, *available at* http://www.opensecrets.org/pubs/speaking/speaking03.html (Statement of Sen. Mel Levine) (1995).

In sum, the current system relentlessly pressures office holders to spend a vast amount of their time fundraising, to the exclusion of other pursuits of campaigning or the public business.

C. The Time Spent Fundraising Diminishes The Quality Of Representation That Elected Officials Provide, And Undermines The Integrity Of The Offices They Hold.

The time spent fundraising interferes with the ability of elected officials to carry out the duties for which they were elected. "We have been transformed from a body of lawmakers into a body of full-time fundraisers." James R. Carroll, *Senate Rejects Limits on Donations*, THE COURIER-JOURNAL, Mar. 27, 2001, at 1A (quoting Senator Ernest Hollings). Legislators do not devote their time to legislation, constituent services, committee work, oversight responsibilities, and debating or negotiating with their

colleagues. As Senator DeConcini stated, "[fundraising] takes away from your ability to represent your constituents, or to do your legislative work." Martin Schram, SPEAKING FREELY 38.

Thus, many legislators neglect their legislative duties in favor of raising money. Representatives and Senators routinely miss important votes due to conflicts with their fundraising activities.[19] Legislators often feel that they do not have the time to meet with or directly represent their constituents. As Representative Christopher Shays lamented, "[Elected officials] spend far too much time fundraising and not enough time listening to their constituents and doing their jobs." 148 Cong. Rec. H339 (daily ed. Feb. 13, 2002) (Statement of Rep. Shays). Former Representative Bob Edgar commented that during an election "eighty percent of my time, 80 percent of my staff's time, 80 percent of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000." Schram, SPEAKING

[19] Former Senate Majority Leader George Mitchell explained that Senators constantly wanted him to reschedule debates because "they [were] either holding or attending a fund-raising event that evening." Senator Mitchell noted that, "[i]f I put all the requests together, the Senate would never vote." Schram, SPEAKING FREELY 37-38; John Harwood, *For California Senator, Fund Raising Becomes Overwhelming Burden*, WALL ST. J., Mar. 2, 1994, at A8 (noting that Senator George Mitchell "is often pestered by colleagues who don't want floor votes to conflict with fundraisers, and sometimes obliges them."); *see also* Greg Krikorian, *California and the West; Campaign Cuts Into Campbell's Voting Record*, L.A. TIMES, July 24, 2000, at A3 (detailing a Representative's abysmal attendance record in Congress while campaigning for United States Senate: "[Representative] Campbell says he has no choice but to miss votes in a system that demands huge amounts of campaign money – a system he wants to change. And his opponent [Senator Diane Feinstein] is a well known, well financed incumbent.").

FREELY 40. The primary focus of elected officials has shifted from serving their constituents to preserving their jobs by raising money.

Elected officials recognize that the excessive demands of fundraising have caused the overall quality of the representation they provide to decline. In Congressional floor debates concerning campaign finance reform legislation, both Republicans and Democrats consistently and repeatedly describe the negative impact that the time devoted to fundraising has on the quality and substance of their representation.[20] Representative Vin Weber stated, "when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work." Schram, SPEAKING FREELY 41. Elected officials increasingly feel that they are forced to choose between attending to their sworn duties and raising money for the purposes of re-election or election to a higher office.[21] One Congressman stated that the time

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[20] *See, e.g.*, 145 Cong. Rec. H8225, H8236 (daily ed. Sept. 15, 1999) (statement of Rep. Udall) ("More and more time is being spent raising money, and this translates into less time being spent doing our duties to support the public and represent our citizens. . . . The high cost of campaigns is unfairly restricting dedicated, qualified people from running for public office, and is putting elected officials in a position of having to choose between spending their time doing their jobs or raising money."); 144 Cong. Rec. H6937, H6943 (daily ed. Aug. 3, 1998) (statement of Rep. Roukema) ("Our campaign finance system is out of control. Costs are skyrocketing. Candidates of all kinds are finding themselves devoting more time and energy to fundraising – at the expense of their public service duties."); 137 Cong. Rec. S5858 (daily ed. May 15, 1991) (statement of Sen. Boren) "When we think of the time it takes away from doing the duties we are elected to perform, we know something is wrong. When we think about the fact that Members of Congress are becoming part-time public officials, part-time policymakers."

[21] In a survey of House and Senate members and their staffs, the Center for Responsive Politics found that 52 percent of the senators

(Continued on following page)

spent fundraising for his Senate race "crippled" his ability to fulfill his Congressional duties. Schram, SPEAKING FREELY 40.[22] While elected officials may prefer to spend their time serving the public, political survival demands that they make these choices.

Not only has the quality of representation declined due to the absence of expenditure limits, but so too has the quality of campaigns for elected office.[23] Because they are consumed with fundraising, candidates do not have time

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surveyed thought the demands of fundraising cut significantly into the time available for legislative work. Another 12 percent believed fundraising had some deleterious effect. *See* Peter Lindstrom, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS – A SURVEY OF THE 100TH CONGRESS (Washington, 1998); *see also* Larry Makinson, SPEAKING FREELY 39 (2d Ed. 2003) ("[T]he dialing for dollars is to get somebody elected. The protecting the dollars [of their constituents] is one of the primary legislative responsibilities. And too often, one comes at the expense of the other," Statement of Rep. Tim Roemer); Schram, SPEAKING FREELY 38, 42-43 ("I needed to constantly raise money. A very real distraction from the real business of legislating," (Statement of Rep. Leslie Byrne) and "[Y]ou'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign. So that which you should be doing doesn't always get the first priority. It becomes very time-consuming, very arduous," (Statement of Sen. Howard Metzenbaum).

[22] Representative Jim Bacchus explained that he chose not to run for re-election because he would have had to abandon the job he had "been elected to do in order to raise a million dollars and be a virtual full time candidate." Schram, SPEAKING FREELY 43.

[23] Naturally, a large percentage of candidates will be current officeholders. There are incumbents seeking re-election, as well as elected officials seeking higher office. An analysis of the 2004 Senatorial elections shows that 68 individuals ran for office for 34 Senate seats, and that of these 70% were elected officials. CQ VOTING AND ELECTIONS COLLECTIONS: EXPERT ANALYSIS, DEMOGRAPHICS AND DATA.

during their campaigns to engage the issues or the voters, to debate their opponents or to discuss ideas.[24]

The excessive demands of fundraising undermine the integrity of the offices that elected officials hold. Senator Robert Byrd complained that the preoccupation with fundraising so interfered with legislating, that it posed an "institutional concern about the integrity of the U.S. Senate." Herbert E. Alexander, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM, at 4, 51 (1992). Former Senator Dennis DeConcini said, "I felt like I was cheating, that I was not putting in a full day's work for what I was really elected to do. I was not elected to come back here and raise money for my next election. And that always has bothered me from the standpoint of what I

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[24] *See, e.g.*, Bob Warner, *Critics Tread on Street/Blast Mayoral Hopeful for Remarks on Fund-Raising*, PHILADELPHIA DAILY NEWS, Sept. 24, 1999, at 15 (quoting mayoral candidate as saying that the continued escalation of fundraising has "changed the whole tenor of political campaigns," and that if the incumbent "had less money to spend on 30-second campaign ads, he would be more willing to engage in debates and other joint appearances, giving voters more chances to evaluate the mayoral candidates face to face."); 133 Cong. Rec. S7782 (Statement of Sen. Hollings) ("In my 1986 reelection campaign, I hardly had time to genuinely stop, look, and listen to the people I was going to represent."); Schram, SPEAKING FREELY, at 40 ("I did raise a lot of money, particularly in my Senate race, and it just drained my time and ability to do anything else. It just crippled my ability to do my job properly in my final term, or to run an effective campaign beyond the fundraising part of it," and "That's just the way it is in politics in general. Other than a few debates and shaking hands, the rest of your time is raising money," Statements of Rep. Mel Levine); Jim Tankersley, *Senate Hopefuls Focus on Money; Campaigns Need Cash to Reach Voters Before the Primaries*, ROCKY MOUNTAIN NEWS, June 11, 2004, at 24A (describing statements by former Representative Robert Schaffer saying that he was spending "120 percent" of his time fundraising in the Republican primary for Senate).

think the people elected me to do." Schram, SPEAKING FREELY 40.[25]

The most recent presidential election cycle provides a final compelling example of the negative effects of unlimited spending. The two major party nominees, both current office holders, decided to forego the public financing available in the primaries.[26] Instead, President Bush and Senator Kerry raised money at a pace of at least one million dollars per day, every day, while also serving as federal office holders. The number of hours they spent raising these vast sums is time lost to the American people. *Amici* submit that the time of these two public servants, and that of all elected officials, is a compelling interest worth protecting.

II. TIME PROTECTION IS A COMPELLING GOVERNMENT INTEREST THAT JUSTIFIES CAMPAIGN EXPENDITURE LIMITS PURSUANT TO *BUCKLEY V. VALEO*.

A. *Buckley v. Valeo* Allows That A Compelling Government Interest Could Be Presented That Would Justify Campaign Expenditure Limits In Light Of The Interest In Preserving The Integrity Of Our System Of Representative Democracy.

In *Buckley*, this Court held that laws that restrict campaign contributions or expenditures must meet exacting

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[25] *See also* Schram, SPEAKING FREELY 40 ("[P]eople would be genuinely unhappy about how much time members have to spend on fund-raising. Portions of every day are spent dialing for dollars," statement of Rep. Dennis Eckhart).

[26] President Bush raised these sums even though he faced no serious primary opponent.

scrutiny.[27] The Court held that the portion of the Federal Elections Campaign Act which limited campaign expenditures was not supported by a compelling government interest and hence violated the First Amendment. By contrast, the Court found that individual campaign contributions survived exacting scrutiny on the grounds that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, *the integrity of our system of representative democracy is undermined.*" *Buckley*, 424 U.S. at 26-27 (emphasis added). The need to protect our system of representative democracy from the appearance or reality of corruption thus provided a compelling government interest for regulating political speech. *See also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 142-45 (2003) (extending this rationale to justify limits on soft money contributions). As set forth in greater detail below, just as our system of representative democracy is undermined by corruption or the appearance of corruption, so too is our system of representative democracy undermined when legislators tend to fundraising at the expense of their core legislative functions.

Thus, *Buckley* and this Court's jurisprudence allow that a compelling government interest could be presented that would justify campaign expenditure limits in light of the interest in preserving the integrity of our system of

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[27] *Amici* suggest that the Court may also consider whether strict scrutiny is required when reviewing campaign finance reform measures, or whether a lesser level of scrutiny would suffice. Irrespective of the level of scrutiny, *amici* submit that there is at least a compelling government interest.

representative democracy.[28] Justice Kennedy noted that such an interest could be demonstrated in light of the post-*Buckley* spending frenzy: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting office holders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting).[29] Similarly, Justice Breyer, in an opinion joined by Justice Ginsburg, argued that, particularly in light of post-*Buckley* developments, legislatures could find compelling reasons to enact campaign finance reform laws,

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[28] Contrary to Judge Winter's dissent in *Landell v. Sorrell*, 382 F.3d at 188-89, this issue has not yet been addressed by this Court and was not considered or developed as a compelling state interest in Buckley.

[29] Several appeals courts and judges have opined that time protection is a compelling government interest. In the instant matter, the Second Circuit observed that "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Landell v. Sorrell*, 382 F.3d 91, 108 (2d Cir. 2004). The Second Circuit has affirmed that the time protection rationale is a compelling government interest. A concurrence in the Sixth Circuit offers a similar perspective: "It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest." *Kruse v. Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, D.J., concurring). In a recent Tenth Circuit case, Circuit Judge Lucero wrote that *Buckley* did not address the time protection rationale that is being urged here. *Homans v. City of Albuquerque* and *Rue v. City of Albuquerque*, 366 F.3d 900, 911 (10th. Cir. 2004), *cert. denied*, 125 U.S. 625 (2004). Nonetheless, majorities in the Sixth and Tenth Circuits ultimately found that there was no compelling government interest justifying the expenditure limitations at issue.

so as to "protect the integrity of the electoral process." *Id.* at 403-04 (Breyer, J., concurring).

B. Because Fundraising Distracts Elected Officials From Their Sworn Duties, Campaign Expenditure Limits Are Vital To Our System Of Representative Democracy And Would Serve A Compelling Government Interest.

Enabling candidates and office holders to spend less time fundraising and more time performing their duties as representatives and interacting with voters is a compelling government interest pursuant to the principles set forth in *Buckley v. Valeo*. Fundraising takes elected officials away from their core duties. This in turn undermines our system of representative democracy. Campaign expenditure limits serve a compelling government interest: they safeguard the integrity of the electoral process and our Republic, and they protect the time of legislators who are duty-bound to serve their constituents and abide by their oath of office.

Protecting the core functions of elected officials is central to the strength of the American Republic. The American Republic is founded on the notion that elected representatives serve the people. As James Madison wrote in FEDERALIST 39, "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39 (James Madison). The Framers put these assurances of representative government in the Constitution itself. *See* U.S. CONST. art.

I; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). The Constitution also carefully enshrines the mechanism of democracy, emphasizing the fundamental importance of representative democracy to our system of government.[30] This Court's jurisprudence has likewise stressed the importance of protecting the mechanisms and principles of representative democracy. *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964).

Likewise, the Constitution directly protects the core functions of legislators in the Speech or Debate Clause, which protects Members of Congress as they carry out their essential functions as legislators, including debating and voting on legislation: "The Senators and Representatives shall ... be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House." U.S. CONST. art. I, § 6. This Court has held that the Speech or Debate Clause is to "be read broadly to effectuate its purposes."[31] Further,

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[30] *See* U.S. CONST. Amend. XV (protecting the vote for emancipated slaves), U.S. CONST. Amend. XIX (protecting the vote for women), U.S. CONST. Amend. XXIV (abolishing the poll tax), U.S. CONST. Amend. XXVI (extending right to vote to eighteen-year-olds).

[31] *United States v. Johnson*, 383 U.S. 169, 180 (1966), citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881). *See also Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that the Speech or Debate Clause is designed to assure the Congress "wide freedom of speech, debate and deliberation").

in *Powell v. McCormack*, this Court held that the purpose of the Speech or Debate Clause is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks. . . ."[32] The Clause has been held to protect more than just literal speech and debate: "it would be a narrow view of the constitutional provision to limit it to words spoken in debate."[33] The protection of the Clause has been applied to various acts, "to things generally done in a session of the House by one of its members in relation to the business before it."[34] This clause underscores the profound importance of these critical legislative functions. "[D]istracting or deterring even a few individual members of a collective legislative body can, of course, undermine the capacity of the body as a whole to do its lawmaking work . . . "[35]

Accordingly, the government has a compelling interest in protecting the time of elected officials who are increasingly forced to spend large amounts of time fundraising instead of legislating, debating, and serving their constituents and the nation.[36]

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[32] *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

[33] *Kilbourn*, 103 U.S. at 204.

[34] *Id.* The Speech or Debate Clause is not without limits. Its protection "has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 624.

[35] *Id.*

[36] *Amici* do not argue that the Speech or Debate Clause on its own provides the sole basis for upholding Vermont's campaign expenditure limits, but it reinforces the central point that there is constitutional support for protecting the time of legislators to do their jobs in an unencumbered fashion.

As set forth above, every hour spent by an elected official making fundraising calls is an hour lost to these representative and legislative functions. This time could be spent communicating with constituents, studying legislation, or otherwise fulfilling core legislative functions as enshrined in the Constitution. As Professor Vincent Blasi has argued, "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUM. L. REV. 1281, 1283 (1994).[37] When devoting their time to fundraising, legislators are not engaging in the core functions of speech or debate: voting, deliberating, and debating or negotiating with fellow representatives.

C. Because Fundraising Drains Candidates' Time, Campaign Expenditure Limits Directly Serve A Compelling Government Interest In Protecting The Integrity Of The Electoral Process.

Active and vocal campaigns are integral to American constitutional democracy. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citing *Buckley* and noting that the Supreme Court has "recognized repeatedly that 'debate on the qualifications of candidates

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[37] *See also* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U.-CHIC. L.J. vol. 4 http://www.ssrn.com/abstract=816244 (forthcoming 2006), 40-44 ("Time stolen for fundraising activities thus both diminishes the representation provided by an individual elected official and the overall capacity of the body to function to its fullest.").

[is] integral to the operation of the system of government established by our Constitution"). Campaigns are the heart of a healthy electoral process. As the *Buckley* Court observed, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." 424 U.S. at 14-15. Thus, campaigns provide for an instrumental dialogue between candidates and voters that is central to the "uninhibited, robust and wide-open" public debate that in large part defines the republican form of government. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[38] Campaign spending limits directly protect the time of candidates so that they can, in any manner they choose, participate fully in this essential conversation.

This Court has repeatedly held that protecting the integrity of the electoral process is a compelling government interest. For example, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978), the Court held, "Preserving the integrity of the electoral process . . . and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *See also Burson v. Freeman*, 504 U.S. 191 (1992) (compelling interest in

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[38] Campaigns serve a crucial function as public fora in which the people express their views. "The conversational model posits that the backbone of democracy, the source of much of the popular respect it commands, and hence much of its strength and stability, is to be found . . . in involvement of the electorate in the democratic conversation." Robert Bennett, *Democracy as a Meaningful Conversation*, 14 CONST. COMM. 481, 501 (Winter 1997).

preventing voter intimidation and election fraud); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 n. 14 (1974) (preservation of the integrity of the electoral process and avoiding voter confusion is compelling); *Storer v. Brown*, 415 U.S. 724, 736 (1974) (state may act to protect compelling "interest in the stability of its political system"). Indeed, the Court has found a compelling government interest in preventing the erosion of public "confidence in the system of representative Government." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). Thus, preserving the integrity of the electoral process is a compelling government interest "basic to a democratic society." *United States v. UAW-CIA*, 352 U.S. 567, 570 (1957).

The time that candidates and office holders spend fundraising takes them away from duties that constitute the core of our system of representative democracy. Protecting the integrity of our system of representative democracy is a compelling government interest.[39] Because candidates and elected representatives are at the heart of

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[39] The Eighth Circuit, in upholding Minnesota's voluntary spending limits, favorably observed that the time protection rationale is "well settled" as a compelling government interest. *See Rosentiel v. Rodriguez*, 101 F.3d 1544, 1554 (8th Cir. 1996). The Eighth Circuit stated that "the State seeks to promote . . . a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Id.* at 1553. *See also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island's public financing law because "such programs 'facilitate communication by candidates with the electorate,' [and] free candidates from the pressures of fundraising.")

the American republic, the government has a compelling interest in protecting their time.[40]

D. Vermont's Campaign Limits Directly Serve This Compelling Interest.

The record in this case demonstrates that Vermont's campaign expenditure limits directly serve a compelling government interest in protecting the integrity of our system of representative democracy. In enacting the law in question, the Vermont General Assembly specifically found that the demands of fundraising take excessive time away from the people's business. 1997 Vt. Laws P.A. 64 (H.28) (finding No. 1). After a full trial, the District Court agreed, finding that "the need to solicit money from large donors at times turns legislators away from their official duties." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). This was confirmed by the Second Circuit: "Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors." *Landell v. Sorrell*, 382 F.3d 91, 121-22 (2d Cir. 2004). In sum, Vermont's campaign expenditure limits protect the time of candidates and elected officials, allowing them to redistribute their time as they see fit, to fully engage in the democratic process.

Moreover, Vermont's expenditure limits are the most narrowly tailored option to serve the compelling government

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[40] For a fuller discussion of the importance of campaigns in American democracy, *see* Alexander, *Let Them Do Their Jobs*, at 34-38; "Campaigns are conversations that educate candidates and empower the people through political dialogue, enhancing representative democracy." *Id.* at 34.

interest described above. Other campaign finance reforms, including those that have already been adopted and approved by this Court – individual contribution limits and public financing – do not adequately serve this interest.

Petitioners argue that individual contribution limits contributed to the fact that in order to meet the costs of running a successful campaign, candidates must spend countless hours raising money from individual donors. This raises the question whether individual contribution limits are a more appropriate response to the problem. However, in *Buckley* the Court acknowledged that individual contribution limits directly serve the compelling government interest in preventing corruption or the appearance thereof. 424 U.S. at 26. Moreover, as this Court observed in *Shrink*, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Nixon v. Shrink Mo. Gov't P.A.C.*, 528 U.S. 377, 395 (2000). Without individual contribution limits, the system would be even more vulnerable to corruption from those seeking access, power and influence.[41] Unlimited contributions are not the most narrowly tailored solution to the time protection problem.[42]

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[41] For further analysis of the numerous studies which document the fact that money can buy votes and change legislative outcomes, *see* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 U.MINN. J.L. & INEQUALITY 239 (2005).

[42] For further explication, *see* Alexander, *Let Them Do Their Jobs*, at 49-54.

Petitioners also suggest that Vermont could turn to public financing to address the time protection concern. VT Repubs Brief at 44. But that also represents a false alternative that does not well serve the compelling government interest. Its effectiveness is limited because public financing schemes are, under prevailing case law, voluntary. Public financing laws provide public funding to a candidate if she chooses to abide by a spending cap. But because these laws rely on voluntary compliance, multi-millionaire candidates and those with prodigious fundraising machines routinely opt out of public funding plans that will not match what private funds or fundraising will generate. As set forth above, the most recent presidential election provides a clear example of the weakness of public financing at the highest level of government. President George W. Bush and Sen. John F. Kerry rejected – with complete political justification – public financing in the primary election cycle, because they could easily raise much more with their own fundraising operations.[43] Instead, they spent their time raising money at the combined rate of a million dollars per day, thus dedicating more time to raising money and less to the business of the people and other campaign events. Thus the Achilles heel of public financing is that without mandatory limits on publicly-financed elections, all candidates remain free to spend unlimited amounts if they reject the public money. A voluntary system of public financing inherently fails to

[43] Governor Dean also opted out of the public financing of the 2004 presidential primaries. *See, e.g.*, http://www.opensecrets.org/presidential/index.asp.

serve the compelling government interest in time protection.[44]

The State of Vermont has enacted sensible limits on campaign expenditures, protecting the time of elected officials and, consequently, "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.[45] Other States and localities have taken related steps to enact meaningful campaign reform, efforts that *amici* have long admired.[46] To the extent that the States are laboratories of democracy,[47] *amici* submit that this Court should clarify that experimentation like that undertaken by the State of Vermont is not per se banned by *Buckley*.

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[44] For a fuller analysis of the shortcomings of voluntary public financing schemes, *see* Alexander, *Let Them Do Their Jobs* at 54-59.

[45] One author has observed,

> It is clear that states have been activists in the area of campaign finance regulation. And while some common approaches and trends can be identified, it is also apparent that the varying political cultures in each state give rise to different solutions. What is deemed a problem in one state is often disregarded in another. . . . [E]ach state is its own laboratory for reform.

Ronald Michaelson, *Trends in Campaign Financing*, THE BOOK OF STATES, Vol. 35, at 275 (2003).

[46] *See, e.g.*, 142 Cong. Rec. S377 (daily ed. Jan. 25, 1996) (Statement of Sen. Bradley) ("I consider those State activists my partners in this reform proposal, and I believe they deserve to have a proposal on the table in Washington that is as radical, as serious, and as real as what people are talking about in the States.").

[47] "Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth." *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citations omitted); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The limits adopted by the State of Vermont are narrowly tailored to serve a compelling government interest. Without spending limits, elected officials at all levels spend inordinate amounts of time fundraising. The time spent fundraising undermines both the performance of their core functions – debating, voting, negotiating, and meeting with constituents – and the quality of campaigns. Protecting the integrity of both elected office and of our system of representative democracy – both in the performance of elected officials and in the conduct of campaigns – is an interest of the highest order, enshrined in both the Constitution and this Court's jurisprudence. As such, protecting the time of elected officials from the excessive demands of fundraising provides a compelling government interest which supports campaign expenditure limits. Accordingly, the Court should first, affirm the Second Circuit and hold that time protection is a compelling government interest, and second, uphold Vermont's common-sense regulations as narrowly tailored to serve this compelling government interest.

CONCLUSION

For the foregoing reasons, the Court should uphold the ruling of the United States Court of Appeals for the Second Circuit.

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